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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/075,326	02/14/2002	Raphael Louis Mangin	CM2502	8690

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EXAMINER

FIDEI, DAVID

ART UNIT	PAPER NUMBER
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3728

DATE MAILED: 01/30/2004

7

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/075,326

Applicant(s)

MANGIN, RAPHAEL LOUIS

Examiner

David T. Fidei

Art Unit

3728

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-4,9,10 and 13-34 is/are pending in the application.
- 4a) Of the above claim(s) 17-26 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-4,9,10,13,15 and 27-34 is/are rejected.
- 7) ☒ Claim(s) 14 and 16 is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
- a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

Election/Restrictions

1. Claims 17-26 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 6.

2. Applicant's election with traverse of election in Paper No. 6 is acknowledged. The traversal is on the ground(s) that an election of species is governed by 37 C.F.R. Section 1.141 (a). This section provides two or more independent and distinct inventions may be provided in a national application where the application and allowable generic claim to all the claimed species. This is not found persuasive because there is no allowable generic claim.

The requirement is still deemed proper and is therefore made FINAL.

Specification

3. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: None of the edges or surfaces set forth in claim 33 are not described in the specification nor is it clear, from the specification as originally filed, that this was the intent of the present invention.

Claim Rejections - 35 USC § 112

4. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

5. Claim 27 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant

regards as the invention. It is unclear how the container in as much as is recited reduces the amount of water that can enter the interior of the container.

6. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

7. Claim 34 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. It is not seen where the present specification, as originally filed, explicitly describes the subject matter of claim 34 with *all* its limitations.¹

Claim Rejections - 35 USC § 102

8. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

¹ The test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, See Vas-Cath, Inc. v. Mahurkar, 19 USPQ2d 1111, 1116-17 (Fed. Cir. 1991) and In re Kaslow, 217 USPQ 1089, 1096 (Fed. Cir. 1983). Furthermore the disclosure must describe the claimed invention with all its limitations. See Tronzo v. Biomet Inc., 47 USPQ2d 1829, 1832-34 (Fed. Cir. 1998); Lookwood v. American Airlines, Inc., 41 USPQ2d 1961, 1966 (Fed. Cir. 1997); Vas-Cath, Inc., USPQ2d at 1117; In re Winkaus, 188 USPQ 129, 131 (CCPA 1975); In re DiLeone, 168 USPQ 592, 593 (CCPA 1971); In re Wohnsiedler 137 USPQ 336, 339 (CCPA 1963).

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

9. Claims 1, 2, 4, 9, 10, 27, 28, 31 and 32 are rejected under 35 U.S.C. 102(b) as being anticipated by Schmidt (Patent no. 4,151,946). In figure 2 a container is disclosed including an interior area for housing a plurality of vertically stacked substrates in as much as is claimed.²

The container 10 of Schmidt comprises a top 12, bottom 14 side walls opposing each other, front 18 and back 16 side walls opposing each other. Overlapping panels 44, 56 and 42, 54, forms Left and right side walls opposing each other. As shown in figure 2 a dispensing opening is defined at the hopper 33. The angle between the front side wall 18 and the bottom wall shown in figure 2 is greater than 90° and less than 180°. The dispensing opening is located in the top side wall and at the intersection between the top side wall and the front side wall. The shape of the container having an outwardly extending front wall as shown in figure 2 manifestly biases vertically stacked articles toward the front side wall.

With respect to claim 2 an angle of about 45° (col. 2, line 49) is considered as being within the claimed range, i.e., about 45° includes 40° which would form an angle of 130°.

As to claim 4, the container is manufactured from a single piece of material, see figure 3

As to claims 9 and 31, the dispensing opening is located between on the intersection between the top side wall 12 and the front side wall 18.

With respect to claims 10 and 32, the curved flaps 32, 34 further extend the dispensing opening vertically downward.

² It has been held that a recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus satisfying the claimed structural limitations. *Ex parte Masham*, 2 USPQ2d 1647 (1987). A reference that contains all the structure defined in a claim, but not the recited use anticipates the claim because a new use does not make an old product patentable, *In re Schreiber*, 128 F.3d 1473, 44 U.S.P.Q.2d 1429 (Fed. Cir. 1997).

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With respect to claim 27, Schmidt discloses all of the features of the claimed subject matter as described above. Hence Schmidt's container is adapted to reduce the amount of water that can enter to the extent claimed. Particularly over a container having a completely open top wall.

As to claim 28, cardboard is contemplated in col. 4, line 15.

Claim Rejections - 35 USC § 103

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 2, 3 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schmidt (Patent no. 4,151,946). While the angle of the front side wall 18 to the bottom side wall depicted in figure 2 is about 135° based upon the disclosure of col. 2, line 49, It would have been obvious to one of ordinary skill in the art to make the angle larger or smaller depending upon the access extent one desires to provide.

Also, a change in size or shape is generally recognized as residing within the level of ordinary skill. It has been held that where the only difference between the prior art device and the claimed device was a recitation of relative dimensions, the claimed device was not patentably distinct from the prior art device, *Gardner v. TED Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. Denied, 469 U.S. 830, 2325 USPQ 232 (1984).

It would have been obvious to one of ordinary skill in the art to modify the carton of Schmidt by constructing the front side wall forming an angle with the bottom side wall between 95° and 115°, because the angle extended would depend upon the degree of hopper access one

wishes to provide to the carton. As such this would have been within the level of ordinary skill and a matter of design choice.

As to claim 29, Official Notice is take that moisture protected cardboard which has been treated with moisture protective barrier is well know to those skilled in the cardboard container are. It would have been obvious to one of ordinary skill in the art to modify the cardboard disclosed by Schmidt by employing moisture protected cardboard which has been treated with moisture protective barrier, in order to provide increased storage and use capacity by protecting the carton from inclement environment conditions.

12. Claims 1-4, 9, 10, 13 and 27, 28, 30, 31, 32, 33 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer et al (Patent no. 5,971,153) in view of Muckenfuhs et al (Patent no. 5,022,216). Bauer et al discloses in figure 1 a prior art container including an interior area for housing a plurality of vertically aligned stacked substrates 5. The container comprises a top side wall, a bottom side wall, a front side wall, a back side wall and right and left side walls. As described in col. 4, lines 13-16, the container in non-rectangular. Due to area 17 being compressed to a greater extent than area 15, a front side wall forms an angle with the bottom side wall that is greater than 90° and less than 180°. The difference between the claimed invention of claims 1, 27 and 31, and Bauer et al and the claimed subject matter resides in a dispensing opening located in the top side wall or the front side wall or on the intersection between the top side wall and the front side wall. Bauer et al provides no hint of how one opens the package.

Muckenfuhs et al discloses a similar package as Bauer et al that are designed to hold compressible vertically stacked articles. Muckenfuhs et al also teaches the construction of a dispensing opening provided the top side wall, the front side wall, and on the intersection between the top side wall and the front side wall, see figures 2-4. One skilled in the art confronted with the prior art device of Bauer et al would have found it desirable, if not necessary, to provide a dispensing opening so that the consumer could remove the contents. It would have been prima facie obvious to one of ordinary skill in the art to modify the prior art device of Bauer et al figure 1 by providing a dispensing opening as taught by Muckenfuhs et al, in order to permit removal of the contents.

From the prior art depiction in figure 1 of Bauer et al, the angle between the front side wall to the bottom wall appears to be within the claimed parameters of claims 2 and 3.

As to claim 4, the manner in which the container is manufactured has no patentable significance with regards to the final product.³

As to claims 9, 10 and 32, the dispensing opening of Muckenfuhs et al figure 5 is clearly located on the intersection between the front side wall and the top side wall. The opening also extends downward towards the intersection of the front side wall and the bottom side wall by virtue of the downwardly extending arc of the opening depicted in figure 5.

As to claim 13, a handle opening structure in the top of figure 1 in Bauer et al comprises a substrate holder in as much as is claimed and disclosed.

With respect to claim 27, the modified container is adapted to reduce the amount of water that can enter to the extent claimed. Particularly over a container having a completely open top wall.

As to claims 28 and 30, plastic is contemplated in col. 3, line 66 of Bauer et al.

As to claim 33, a plurality of vertically stacked products are housed within the interior of the container with each substrate 5 has a front face 7, a second face 9 and an edge surrounding the perimeter of faces defined by a first edge portion 6 and a second edge portion 8. As shown in figure 1 of Bauer et al, the front face 7 faces the front wall of the container with each second face 9 of the substrates faces towards the back wall. Modifying Bauer et al as contemplated herein would result in the first edge portion 6 adjacent the dispensing opening.

With regard to claim 34, a length is defined between the front and back wall that is less than a height of the substrate. In Bauer et al the length appears to be slightly more than the height

³ A "product by process" claim is directed to the product per se, no matter how actually made, In re Hirao, 190 USPQ 15 at 17(footnote 3). See also In re Brown, 173 USPQ 685; In re Luck, 177 USPQ 523; In re Fessmann, 180 USPQ 324; In re Avery, 186 USPQ 161; In re Wertheim, 191 USPQ 90; and In re Marosi et al, 218 USPQ 289, all of which make it clear that it is the patentability of the final product per se which must be determined in a "product by process" claim, and the an old or obvious product produced by a new method is not patentable as a product, whether claimed in "product by process" claims or not. During examination, the patentability of a product-by-process claim is determined by the novelty and non-obviousness of the claimed product itself without consideration of the process for making it which is recited in the claim. In re Thorpe, 227 USPQ 964 (Fed. Cir. 1985).

of the substrates. However, this parameter depends upon the size of the substrate packaged, col. 3, line 38 contemplates diapers or sanitary napkins. Also, this parameter would depend upon the number of substrates packaged, Bauer et al discusses between 10 to 100 in col. 4, line 1. To the extent that this parameter is not envisioned by these parameters disclosed by Bauer et al, it would have been obvious to one of ordinary skill in the art because the number or size of the substrates packaged depends upon the quantity one desires to provide.

13. Claims 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bauer et al (Patent no. 5,971,153) in view of Muckenfuhs et al (Patent no. 5,022,216) as applied to claim 1 above, and further in view of Simpson (Patent no. 6,318,589). The difference between the claimed subject matter and the modified device of Bauer and Muckenfuhs is a substrate-dispensing aid.

Simpson discloses a dispenser with a member 15 used to bias coupons towards a front wall. As such it is demonstrated that it well known to those skilled in the art to provide carton dispensers with means for biasing the articles to a dispensing opening. It would have been obvious to one of ordinary skill in the art to modify the package by including a dispensing aid, in order to bias the articles or substrates towards the dispensing opening.

Allowable Subject Matter

14. Claims 14 and 16 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Conclusion

15. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

16. Telephone inquiries regarding the status of applications or other general questions, by persons entitled to the information, "should be directed to the group clerical personnel and not to the examiners. In as much as the official records and applications are located in the clerical section of the examining groups, the clerical personnel can readily provide status information without contacting the examiners", M.P.E.P. 203.08. The Group clerical receptionist number is (703) 308-1148.

If in receiving this Office Action it is apparent to applicant that certain documents are missing, e.g., copies of references cited, form PTO-1449, form PTO-892, etc., requests for copies of such papers or other general questions should be directed to Tech Center 3700 Customer Service at (703) 306-5648, email CustomerService3700@uspto.gov.

Any inquiry concerning the MERITS of this examination from the examiner should be directed to David T. Fidei whose telephone number is 703 263-0164. The examiner can normally be reached on M-Th.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached at (703) 308-2672.

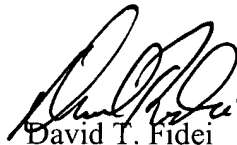
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David T. Fidei
Primary Examiner
Art Unit 3728

dtf
January 25, 2004